Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Connect America Fund	)	**WC Docket No. 10-90**
	)	
A National Broadband Plan for our Future	)	**GN Docket No. 09-51**
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	**WC Docket No. 07-135**
	)	
High Cost Universal Service	)	**WC Docket No. 05-337**
	)	
Developing a Unified Intercarrier Compensation Regime	)	**CC Docket No. 01-92**
	)	
Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
	)	
Lifeline and Link-Up to the Federal-State Joint Board	)	**WC Docket No. 03-109**
	)	

REPLY COMMENTS OF CENTURYLINK

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COMMENTS OF CENTURYLINK

INTRODUCTION AND SUMMARY

More than eighty parties filed comments in response to the Commission's recent Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, which invited comments on proposals for comprehensive reform of the universal service and intercarrier carrier compensation system.[1] Parties universally agreed that the

[1] *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking and

Commission should act to address the arbitrage problems highlighted in Section XV of the NPRM, and the large majority encouraged the Commission to act on these issues, and in advance of completing and implementing the comprehensive reforms.

On the three particular arbitrage issues, overall there was remarkably broad agreement. Most parties agreed that the Commission should confirm that traffic originating in Internet protocol ("IP-on-the-PSTN traffic") is subject to the same intercarrier compensation treatment, under current rules, as other, more traditional traffic. Even parties with different ideas about how best to reform intercarrier compensation and universal service generally shared this view. No party defended stripping or falsifying identifying information to create phantom traffic, and there was widespread support for adopting rules to prohibit the practice. Most parties agreed the Commission should adopt rules to restrain traffic pumping abuses.

CenturyLink joins these parties in support the Commission's initiative to act on these three issues. CenturyLink has particular interest in intercarrier compensation and the support it has long provided for universal carrier of last resort ("COLR") service in high cost areas. CenturyLink serves many rural, high-cost areas,[2] and providing voice service and deploying broadband networks in high cost and rural areas pose substantial challenges. Even maintaining the existing voice service network is uneconomic for many areas, absent long-standing universal service support mechanisms.

Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb 9, 2011) (*NPRM*). *See* Public Notice, 76 Fed. Reg. 11,632 (Mar. 2, 2011).

[2] 84% of CenturyLink's service territory is in low-density high cost environments, with fewer than 30 people per square mile. (CenturyLink's initial comments mistakenly listed the percentage as 74. *See* CenturyLink at 2, 8.)

As a first step to comprehensive universal service and intercarrier compensation reform, the Commission can and should act to reduce arbitrage and disputes within the current intercarrier compensation regime. The record, CenturyLink believes, shows that the appropriate steps are for the Commission:

> (1) to confirm IP-on-the-PSTN traffic is and has always been subject to the same intercarrier compensation treatment as other traffic;
>
> (2) to adopt its proposed phantom traffic rules, with adjustments recommended by USTelecom including extending the principle of the *T-Mobile Order* to CLECs; and
>
> (3) to adopt its proposed phantom traffic rules or similar alternatives outlined in CenturyLink's comments.

I. THE COMMISSION SHOULD RECONFIRM THAT INTERCARRIER COMPENSATION APPLIES TO IP-ON-THE-PSTN TRAFFIC.

A. The Commission Should Make Clear that Failure to Comply with Existing Intercarrier Compensation Obligations for IP-on-the-PSTN Traffic is Improper.

A broad range of commenters showed that some providers' failure to comply with access rules -- and fail to honor their obligations to terminating and originating carriers. ILEC, CLECs, cable TV companies, and state commissions widely agreed that VoIP arbitrage is damaging to the industry and to the public interest. This should put to rest the myth that there is "uncertainty" about whether traffic is exempt from the current access regime under existing law.

Indeed, the record shows that the large majority of commenters agreed with CenturyLink that, under current law, access charges apply to calls regardless of whether

they may have originated using in Internet protocol technologies off the PSTN.[3] State commissions also agreed that access does and should apply to IP-originated and IP-terminated calls.[4]

That broad agreement is not surprising. The large majority of carriers have consistently honored their access obligations on this traffic -- demonstrating the industry's recognition that IP-on-the-PSTN traffic has always been subject to the Commission's access long-standing regime. Although the NPRM notes that "the Commission has declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic,"[5] whether or not the Commission has yet provided "clear resolution" does not mean that IP-on-the-PSTN traffic has ever been exempt from the Commission's long-standing intercarrier compensation rules. The lack of explicit guidance by the Commission has not given carriers freedom to pretend the rules are whatever they want them to be. Even the Commission itself does not have complete freedom to change the intercarrier treatment of IP-on-the-PSTN traffic retroactively.

A few parties argued that access charges cannot apply to IP-on-the-PSTN traffic because IP technology did not exist when Congress adopted the 1996 Act.[6] Their argument is based on a faulty reading of the D.C. Circuit's decision in *WorldCom v. FCC*,[7] which addressed Section 251(g) of the Act. That section "continues" all "pre-

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[3] *E.g.,* Time Warner Cable at 7; COMPTEL at 2; TDS at 3; FairPoint at 6; AT&T at 25; CenturyLink at 3.

[4] *E.g.,* California PUC at 2-3; Mississippi PSC at 15; Missouri PSC at 4; Pennsylvania PUC at 11.

[5] NPRM at ¶ 604.

[6] Comcast at 6; Sprint at 4 n.5.

[7] *WorldCom, Inc. v. FCC,* 288 F.2d 429, 433 (D.C. Cir. 2002).

existing obligations" under Commission rules or policy.[8] Their argument fails, because those obligations certainly include compliance with the Commission's long standing interstate access charge regime.[9]

The Commission should confirm "that IP-originated traffic is subject to the same intercarrier compensation charges -- intrastate access, interstate access, and reciprocal compensation -- as other voice telephone service traffic both today, and during any intercarrier compensation reform transition."[10] On a going forward basis, after comprehensive reform of intercarrier compensation and universal service, the Commission could adopt other, prospective rules.

Some parties, including Comcast and Verizon, argued that the Commission should adopt bill-and-keep or a unique, minimal rate for the exchange of IP-originated traffic because that would encourage carriers to transition to IP networks.[11] Neither party, however, offered any reason applying the same rules to IP-on-the-PSTN traffic would somehow discourage transition to IP networks. In reality, providers across the country have already been investing heavily in IP technology, such as soft switches, SIP trunking, and other IP network facilities. Manufacturers have responded; most no longer exclusively manufacture legacy TDM switch technologies. With billions of dollars already invested in infrastructure, providers "make decisions on whether to add investment based on the state of cost recovery in existing networks and the efficiencies that can be gained through upgrades." Naturally, although "[t]he existing compensation

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[8] 47 U.S.C. § 251(g).

[9] *WorldCom,* 288 F.2d at 433.

[10] *Id.* at ¶ 618.

[11] Comcast at 4; Verizon at 5.

pricing may have been originally set in a TDM-based environment, but it was designed to recover the costs of providing service that have not magically disappeared because some carriers have now adopted all-IP network architectures."[12]

The transition to IP-networks is already underway. The transition to IP, however, is going to require a great deal of investment. The Commission cannot presume that the transition to IP will somehow be free of costs. Shortchanging carriers by largely exempting IP-originated traffic would only handicap local network investment by LECs across the country. A policy that artificially incents carriers to shift to IP to avoid or reduce access charges will, by design, reduced revenues for local network operators. Already more than a quarter of traffic on the PSTN likely originates in IP.[13]

Until the Commission has completed comprehensive reform of intercarrier compensation and universal service, artificially depriving local network operators of intercarrier compensation can serve only to retard, not accelerate, local network investment of all types -- especially for more rural carriers. Time Warner Cable pointed out, "new artificial distinctions among types of traffic would hinder the Commission's longer-term reform goals."[14] Starving local network operators of access revenue would not promote investment in IP, it would needlessly delay broadband deployment and investment.

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[12] ITTA at 8.

[13] *See* CenturyLink at 7.

[14] Time Warner Cable at 9.

B. The Commission Should Not Adopt Separate Intercarrier Compensation Rules for IP-Originated Traffic.

It makes no sense to adopt interim rules giving VoIP different treatment than other traffic. The Pennsylvania Public Utility Commission put it plainly:[15]

> At the end of the day, "traffic is traffic" no matter in what protocol it is initiated, transmitted, and eventually terminated with or without necessary protocol conversions. Furthermore, telecommunications carriers are constantly called upon and are legally obligated to transport, switch and terminate traffic of various protocols- including time division multiplexing (TDM), VoIP, and other protocols-through the use of the same physical facilities while accruing relevant economic costs for the use of such facilities.

For these same reasons, many parties agreed with the Pennsylvania commission that nomadic VoIP should be subject to the same rules as fixed VoIP or any other IP-on-the-PSTN traffic.

Time Warner Cable likewise explained that "traffic terminated by LECs should be subject to the same intercarrier compensation rules regardless of the technology used by the originating carrier."[16] Creating "new, artificial distinctions among types of traffic would hinder the Commission's long-term reform goals."[17] Those goals include, PAETEC points out, "unifying a carrier's charges to terminate all types of traffics."[18] Creating a separate rate for IP-on-the-PSTN traffic would "worsen, not eliminate, harmful arbitrage,"[19] and "exacerbate current disputes and arbitrage as providers would

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15 Pennsylvania PUC at 3.

16 Time Warner Cable at 5.

17 *Id.* at 9.

18 PAETEC, et al. at 32.

19 Windstream at 6.

have an even greater incentive to claim their traffic is entitled to the VoIP-specific rate."[20] Giving IP-on-the-PSTN traffic preferential treatment "will only encourage further uneconomic arbitrage"[21] and "invite arbitrage and fraud."[22]

Cablevision and Charter pointed out that "[t]here is no basis in law of policy to distinguish between VoIP and circuit-switched traffic for intercarrier compensation purposes."[23] There is no "policy rationale for compensating VoIP traffic differently," because the ESP Exemption does not apply to IP-on-the-PSTN.[24] The ESP Exemption allows information service providers (formerly called "enhanced service providers") to be treated as end users, rather than carriers, under the access charge regime. But as Cablevision and Charter outlined, the Commission created the exemption "to prevent calls between information service providers *and their customers* from being subject to access charges."[25]

The Commission had found that "ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephone solely because ISPs use ILEC networks to receive calls from their customers."[26] The exemption has never applied to voice calls routed by carriers to or from VoIP providers. Regardless, even if you assumed VoIP providers could be "end users," since a carrier routes the call

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[20] PAETEC, et al. at 31-32.

[21] NECA, et al. at 13.

[22] Cablevision & Charter at3.

[23] *Id.* at 7.

[24] Cablevision & Charter at 10. *See also* Consolidated at 18-21; ITTA at 13-16; CenturyLink at 15-16.

[25] Cablevision & Charter at 10-11. (emphasis added).

[26] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982 at ¶¶ 341-42 (1979) ("Access Charge Reform Order").

across exchange boundaries, the carrier's access to the LEC serving that "end user" is subject to access charges when it is on the PSTN.[27]

Cbeyond, Integra, and tw telecom also agree that the Commission "should apply the same intercarrier rates to all voice telephone traffic, including interconnected VoIP traffic."[28] This will provide a level playing field among competitors, regardless of technology.[29] It will discourage improper, often unlawful disputes and will reduce needless, expensive litigation.[30] And it will avoid the risk of carriers misrepresenting what traffic is IP-originated.[31]

This broad consensus makes sense.[32] IP-on-the-PSTN traffic uses the PSTN in the same way, for the same reasons, and imposes the same costs. The calls are indistinguishable on the PSTN. Commission policy and precedent also support treating this traffic like any other TDM traffic. The Commission has found that VoIP traffic shares the obligation to support universal service, because all service providers that interconnect, directly or indirectly, to the PSTN benefit from that network. "[I]nterconnected VoIP providers, like telecommunications carriers, have built their businesses, or a part of their businesses, on access to the PSTN." Consequently, "we find

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[27] 49 C.F.R. §§ 69.5(b).

[28] Cbeyond, et al. at 4.

[29] *See Universal Service Contribution Methodology*, 21 FCC Rcd 7518 at ¶ 44 (2006) (noting that Commission rules must "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another").

[30] CBeyond (at att. A) attached a copy of a lawsuit complaint filed against Verizon after that carrier "unilaterally 're-rated' Cbeyond's access service down to $0.0007 per minute for interstate and intrastate calls," ignoring its lawfully tariffed rates. CenturyLink is one of several carriers that previously has had to sue Verizon for similar unlawful short-payment on alleged IP-originated traffic, and disputes with Verizon are rising rapidly.

[31] *Id.* at 6.

that the public interest requires interconnected VoIP providers ... contribute to the preservation and advancement of universal service *in the same manner* as carriers that provide interstate telecommunications services."[33] The Commission has repeatedly emphasized the importance of competitive and technological neutrality in its rules.[34] State commissions agreed that IP-on-the-PSTN traffic is indistinguishable from traditional telecommunications traffic and should be "subject to the same ICC regime."[35]

At the same time, until the industry has transitioned to a comprehensive, reformed intercarrier compensation/universal service system, intercarrier compensation remains the foundation of universal service and an underpinning of the carrier-of-last-resort obligation.[36] The Commission's own studies show that, today, one-fifth of the nation's fixed wireline voice connections are provided through interconnected VoIP, even as traditional switched access lines declined by 8 percent last year alone.[37]

If the Commission were somehow to give IP-on-the-PSTN traffic an exemption from the access rules, the impact on universal service and the PSTN would be real and immediate. It would skew competition, undermine broadband deployment and

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[33] *USF Contribution Order* at ¶ 43 (emphasis added).

[34] "As the interconnected VoIP service industry continues to grow, and to attract subscribers who previously relied on traditional telephone service, it becomes increasingly inappropriate to exclude interconnected VoIP service providers from universal service contribution obligations." *USF Contribution Order* at ¶ 44, *quoting Communications Assistance to Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 at ¶ 42 (2005) ("*CALEA Order*").

[35] *E.g.,* Iowa Utilities Board at 9, 10. By all means, "policy makers should not tilt the competitive playing field by choosing to favor (or disadvantage) any particular carrier based solely upon the technology used" in originating the call. NARUC at 4-5.

[36] *E.g.,* Windstream at 5; ITTA at 2; NECA, et al. at 6; CenturyLink at 6.

[37] Industry Analysis & Technology Division, Wireline Competition Bureau, *Local Telephone Compensation: Status as of June 30* (Mar. 2011) at 2, 3 & figs. 2, 3.

investment, harm consumers, and only worsen regulatory uncertainty and disputes. Such a step would be arbitrary and unreasonable. Specifically, "[t]he proposals suggested in ¶ 615 to immediately adopt a Bill-and-Keep regime for VoIP, and in ¶ 616 to create VoIP-specific intercarrier compensation rates ... are prescriptions for protracted litigation -- litigation the FCC is likely to lose."[38]

A handful of parties want the Commission to adopt a different pricing system for IP-on-the-PSTN traffic. XO proposes that Section 251(b)(5) intercarrier compensation rates be applied to IP-originated traffic.[39] Vonage proposes bill-and-keep treatment for IP-on-the-PSTN traffic.[40] But since both proposals would rely on self-certification, either approach -- even ignoring their other shortcomings -- would only guarantee more disputes. Moreover, Vonage admits that no one can really identify VoIP traffic in calling records, so auditing call records after the fact would be largely pointless. Some wireless carriers want the Commission to exempt this traffic from access charges altogether, by imposing an artificial bill-and-keep regime just for this traffic, based on a technology used in its origination outside the PSTN.[41]

The majority of commenters plainly oppose such differential treatment for IP-on-the-PSTN traffic, and they have far more compelling reasons.[42] AT&T was representative of most filers, encouraging the Commission to end to "the arbitrage

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[38] NARUC at 6 (noting also that such changes would "require the FCC to virtually rewrite key sections of the Statute -- overriding literally decades of case law, ignoring express reservations of State authority, and redefining statutory terms in a manner that Congress could never have intended").

[39] XO at 31-34.

[40] Vonage at 13.

[41] Verizon at 3; CTIA at 12, Sprint at 3.

[42] *E.g.,* Core at 10; Cox Communications at 6; Windstream at 3-4; Frontier at 6.

opportunities and competitive imbalances" that affect this traffic.[43] The Commission's failure to expressly address this issue has emboldened some providers to disregard their access obligations, which in turn "has resulted in industry-wide litigation and harmful disincentives for investment."[44] That litigation and the growing disputes about alleged IP-on-the-PSTN traffic "threaten to undermine universal service," particularly in rural areas.[45] Cablevision and Charter called on the Commission to confirm "that VoIP and circuit-switched traffic are subject to identical rates without delay."[46]

CenturyLink agrees that the Commission can appropriately resolve this issue "by confirming existing ICC rates currently apply to VoIP in the same manner as other traffic."[47] That confirmation would, in fact, be wholly "consistent with the Commission's desire for a more rational intercarrier compensation system and advancement of broadband deployment," especially in rural areas where investment is most difficult to justify.[48]

C. The Commission Cannot Deem Interconnected IP-on-the-PSTN Traffic Subject to Existing Intercarrier Compensation Obligations Solely on a "Prospective Basis."

Many parties further agreed that it would be wrong to reward parties that have been improperly disputing -- or withholding payment on -- LEC access charges. The Commission may change its rules going forward, and, again, CenturyLink supports

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43 AT&T at 25. *See also* ITTA at 2-5; Windstream at 5-6; CenturyLink at 6-9.

44 AT&T at 26.

45 NECA, et al. at 6.

46 Cablevision & Charter at 13.

47 NECA, et al. at 8.

48 Windstream at 3.

comprehensive reform of universal service and intercarrier compensation. The Commission cannot retroactively change what its rules already require.

CenturyLink agrees with other parties that any carrier that acted on the "theory" that if IP-on-the-PSTN traffic is exempt from access charges -- or somehow entitled to a lower intercarrier compensation rate -- "made a reckless decision that is unsupported by Commission precedent."[49] Such parties have not simply been improperly exploiting opportunity; they have been trying to force the direction of Commission policy. While the majority of carriers have acted responsibly by following the rules, these bad actors have showed contempt for the Commission's authority and its discretion to direct intercarrier compensation reform policy.

The Commission should not reward such "reckless" or "risky behavior,"[50] and should consider seriously how tolerating such an atmosphere has dampened the very capital investment the agency means to promote. It should also take a realistic view of the true motives of parties when assessing the credibility of their arguments for special intercarrier compensation treatment for IP-originated traffic. It should recognize why these parties want the Commission to "limit the scope of any decision with respect to the proper compensation for VoIP traffic to prospective effect," while ignoring these carriers' "past liabilities."[51]

After years of paying access on IP-originated traffic, the problem carriers that have been failing to comply with these rules only lately "discovered" that VoIP is something special. Their convenient rationales for evading access obligations typically

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[49] ITTA at 6.

[50] *Id.* at 6.

[51] Level 3 at 11.

lack any credibility. Some may be reacting to business difficulties. CommPartners, for example, advised the Commission in comments filed in 2008 that it "paid every nickel" of access charges for its IP-originated traffic.[52] The following year it asserted VoIP was exempt under the ESP Exemption and stopped paying. Its motives were clearer when it filed for bankruptcy in 2010.[53]

Sprint had long paid access on its IP-on-the-PSTN traffic, then unilaterally changed the rules for itself after a downturn in its business. In March, the U.S. District Court for the Eastern District of Virginia issued a ruling in a lawsuit brought by CenturyLink's Embarq operations. The judge found that[54]

> [t]he fact that Sprint so cavalierly has shifted its position on the rates it is now willing to pay for VoIP-originated traffic ... illustrates that its disputes were based on efforts to cut costs, rather than on a legitimately held belief that [it was not required] to pay at the levels which, for years, it had paid without protest.

The court also noted "the fact that Sprint challenged [access] bills in stages, progressively lowering the rate at which it was willing to compensate the Plaintiffs."[55] At first, Sprint sought to justify its short-payment (and its disregard of proper dispute procedures) by arguing "'the most that [it] can be charged for VoIP traffic is interstate access,' because,

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[52] Comments of CommPartners at 1 & n.1, *Petition of the Embarq Local Operating Companies,* WC Docket No. 08-8 (filed Feb. 19, 2008).

[53] *In re CommPartners Holding Corp.,* Case No. BK-S-10-20932 (D. Nev.) (bankruptcy petition filed June 13, 2010).

[54] *Central Telephone Co. of Va. v. Sprint Communications Co.,* ___ F. Supp.2d ___, slip op. No. 3:09CV720 (E.D. Va. Mar. 2, 2011) at 16.

[55] *Id.* at 15.

in Sprint's estimation, the FCC had determined that VOIP traffic is interstate in nature."[56] So Sprint re-rated intrastate charges to lower interstate rates. Later,[57]

> Sprint reached the conclusion that even re-rating traffic billed at intrastate rates to interstate rates did not produce the cost savings that it sought to realize. In consequence, Sprint decided that it would only pay the Plaintiffs $.0007 per minute for termination of VoIP-originated traffic, a rate even lower than that Plaintiffs' interstate rates. ...
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> [T]he record leaves no doubt, the motivating force in selecting that rate was not that Sprint honestly perceived the $.0007 rate more appropriate than the rates at which it had been billed by the Plaintiffs. What mattered for Sprint, to the exclusion of all other considerations, was that the $.0007 rate permitted the greatest savings for the company. Sprint therefore had no qualms overlooking the inconvenient detail that the $.0007 rate it chose did not apply to the type of VoIP traffic for which Sprint had received the Plaintiffs' termination services.

The judge found Sprint's arguments were "founded on post hoc rationalizations developed by its in-house counsel and billing division as part of [its] cost cutting efforts," and "not at all credible."[58] Still, Sprint now wants the Commission to believe another one, as it pretends that IP-on-the-PSTN traffic "is not subject to access charges (per the ESP exemption)."[59]

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[56] *Id.*

[57] *Id.* at 15-16.

[58] *Id.* at 3.

[59] *Id.* at 4. In its latest comments, Sprint urges the Commission, prospectively, to adopt bill-and-keep treatment for ostensibly IP-originated traffic, because of "significant market distortions [that] have arisen because competitors are assessed and/or pay different rates for the same underlying function." Sprint at 3. Of course, Sprint's own failure to comply with access tariffs and contract commitments has created those very "market distortions."

Only a short time before, the Iowa Utilities Board rejected Sprint's claims that IP-originated traffic is not subject to intrastate access charges. The Board ordered Sprint to pay Windstream's billed access charges, and criticized its withholding.[60]

Verizon's shifting rationales have been similarly cavalier toward the Commission and its rules. A few years ago, Verizon began short-paying LECs for purported IP-originated traffic, arguing VoIP was purely interstate in nature. That prompted several lawsuits.[61] Today, LECs -- including CenturyLink -- now have growing disputes with Verizon for new access short-payment practices. Cbeyond attached a copy of its latest complaint filed against Verizon for failure to pay tariffed access charges. Cablevision and Charter pointed out that Verizon, when commenting on the National Broadband Plan, ironically emphasized the importance of recognizing that all traffic should be treated the same under the current rules.[62]

> Applying [a] rate equally to all providers and all traffic -- and transitioning all providers to that rate simultaneously -- will ensure

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[60] *Sprint Communications Co. v. Iowa Telecommunications Services*, Docket No. FCU-2010-001, Order (Iowa Utils. Bd. Feb. 4, 2011), *recon. and stay denied.* Sprint also urges the Commission, prospectively, to adopt bill-and-keep treatment for ostensibly IP-originated traffic, because of "significant market distortions [that] have arisen because competitors are assessed and/or pay different rates for the same underlying function." Sprint at 3. Of course, Sprint's own failure to comply with access tariffs and contract commitments has created those very "market distortions."

[61] *CenturyTel of Alabama, et al. v. MCI Communications Services*, No. 1:2009cv009 (E.D. Va. filed Jan. 06, 2009); *Central Tel. Co. of Virginia, et al. v. MCI Communications Services, et al.*, No. 1:2008cv00875 (E.D. Va. filed Aug. 27, 2008); *Windstream Communications, et al. v. MCI Communications Services,* No. 1:2008cv00384 (E.D. Va. filed Apr. 23, 2008); *Citizens Tel. Co. of California, et al. v. MCI Communications Services*, No. 1:2007cv01265 (E.D. Va. filed Dec. 18, 2007). Verizon subsequently settled each of the cases.

[62] *See* Cablevision & Charter at 3, *quoting* Verizon Communications, Inc. Comments to national Broadband Plan, GN Docket No. 09-41 at 20 (filed Dec. 7, 2009).

> that the new regime will be competitively and technologically neutral.

Verizon now encourages the Commission to adopt an arbitrary $0.0007 rate for traffic if a carrier claims it originated in IP technology. It also asks the Commission to allow carriers to negotiate other rates[63] -- a position naturally appealing to a carrier of its size. That also explains why it wants the Commission to limit any statement on access treatment for IP-on-the-PSTN traffic to purely prospective effect.[64]

D. Classification of VoIP as "Information Services" or "Telecommunications Services" is Irrelevant for Intercarrier Compensation Treatment.

Several parties agreed that the Commission does not need to address the regulatory classification of VoIP services in order to adopt interim rules confirming that IP-on-the-PSTN traffic is subject to access.[65]

Whatever regulatory treatment is given the VoIP, the traffic at issue here indistinguishable from other traffic on the PSTN.[66] AT&T explained that "the critical issue" is the treatment of traffic exchanged between carriers on the PSTN and "the *CLECs* that serve VoIP providers."[67] IP-on-the-PSTN is traffic, handed off by a telecommunications carrier, and delivered in conventional *TDM format* for termination

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[63] *E.g.,* Verizon at 5.

[64] AT&T also noted that "Notwithstanding their insistence that access charges do not apply to IP-to-PSTN traffic when they deliver that traffic to the PSTN, some CLECs nonetheless collect access charges today on PSTN-to-IP traffic bound for their VoIP-provider customers." AT&T at 26 n.56.

[65] NPRM at ¶ 618.

[66] ITTA at 10.

[67] AT&T at 26 (emphasis in original).

on the PSTN. These CLECs are acting as telecommunications carriers even when handling IP-originated traffic.

The use of IP technology in originating a call does not exempt that traffic from this aspect of the country's universal service system under current law. The Commission has clear authority to adopt rules governing the compensation exchanged between such carriers.[68] As the NPRM noted, "interconnected VoIP traffic is 'telecommunications' traffic, regardless of whether interconnected VoIP services were to be classified as a telecommunications service or an information service."[69] The Commission has ample authority to issue an order confirming IP-on-the-PSTN is subject to the same intercarrier compensation rules as other traffic.

II. THE COMMISSION SHOULD PROMPTLY ACT TO ADDRESS THE GROWING ABUSE OF PHANTOM TRAFFIC.

A. The Commission Should Adopt Rules to Prohibit Phantom Traffic.

Parties wholly agreed with the Commission "that traffic lacking sufficient information to enable proper billing of intercarrier compensation charges is not consistent with the public interest, and rules are needed to address this problem."[70] As the Iowa Utilities Board noted, "the Commission should make an effort, as soon as possible, to

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[68] *See Time Warner Cable Request for Declaratory Ruling that CLECs May obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended to Provide Wholesale Telecommunications Services to VoIP Providers,* 22 FCC Rcd 3513 (2007).

[69] NPRM at ¶ 615, referring to 47 U.S.C. § 251(b)(5).

[70] NPRM at ¶ 624.

adopt changes to its call signaling rules that would resolve the phantom traffic issue.[71] After all, "rules to eliminate 'phantom traffic' are long overdue."[72]

Accordingly, commenters widely applauded the Commission's proposed rules as a reasonable approach with a broad consensus of support. As the California Public Utilities Commission noted, "these new rules [should] be extended, as the FCC proposes 'to all traffic originating or terminating on the PSTN, including, but not limited to, jurisdictionally intrastate traffic and traffic transmitted using Internet protocols.'"[73] NPRM at 629. These rules are necessary to reduce arbitrage abuse and ensure carriers are "fairly compensated" by providers sending "traffic on their networks."[74]

Parties uniformly agreed that the Commission has authority to adopt phantom traffic rules.[75] With phantom traffic, it is impossible to separate the intrastate and interstate services, so that regulation of interstate services would be impossible without including intrastate services. In such instances, the Commission has clear authority.[76] The Commission also has ancillary authority where necessary to prevent frustration of regulatory [power] authorized by statute."[77] The Commission also has broad authority over numbering under Section 251(e).[78]

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71 Iowa Utilities Board at 18.

72 Windstream at 14.

73 CPUC at 6, *quoting* NPRM at ¶ 629.

74 Iowa Utilities Board at 18.

75 *E.g.,* Consolidated at 30; AT&T at 22.

76 *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986).

77 *Comcast v. FCC,* 600 F.3d 642, 654 (D.C. Citr. 2010).

78 *See also Rules and Policies Regarding Calling Number Identification Service - Caller ID*, 10 FCC Rcd 11700 at ¶ 60 (1995) (finding signaling systems for transmitting CPN "jurisdictionally mixed.").

B. The Commission's Proposed Rules Are a Good Start, But Warrant Some Clarifications and Adjustments.

Many commenters -- CenturyLink among them -- nevertheless suggested that some adjustments would improve the Commission's proposed rules. Many parties emphasized, in particular, that "to ensure proper billing, the Commission should make clear that ILECs may invoke the Section 252 negotiation and arbitration process with respect to wireline CLECs."[79] An unrelated intermediate carrier, moreover, should not "be held financially responsible for traffic it receives from another provider that does not include the information needed to ensure proper billing."[80] It should not be required to "track[] down the missing information" and should not be require to "pay[] transport and termination charges."[81] Such responsibility for compensation belongs with the provider that failed to provide the information or that stripped the information before handing off the call.[82] CenturyLink disagrees with the few parties that suggest that intermediate carriers or IXCs should be responsible because for upstream carriers.[83] On the contrary, "the Commission should not punish the transiting carrier for the sins of the originating carrier,"[84] nor penalize it because the terminating carrier fails to exercise any reasonable due diligence to identify the originating carrier.

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[79] Windstream at 17. *See also* USTelecom at 5-6; CenturyLink at 24-25.

[80] Comcast at 9.

[81] *Id.* at 9-10.

[82] NPRM at ¶ 626.

[83] PAETEC, et al. at 11-12; Consolidated at 38.

[84] Time Warner Cable at 12. AT&T (at 23) asked the Commission to clarify that the rules do not impose an obligation on the originating provider to signal information all the way to the terminating provider, even if there are intermediate providers that it cannot control. CenturyLink agrees that such clarification would be appropriate.

The rural associations, filing together, ask the Commission to "clarify that providers may not substitute a number of a calling 'platform' or gateway' for the CPN or CN associated with the originating caller."[85] CenturyLink agrees. Similarly, the Commission should confirm that the assignment of a telephone number that does not correspond to the actual physical location of the originating caller does not alter the actual jurisdiction of the call, including for rating purposes. Geographical end-points and not telephone numbers are the proper determinants of whether a call is local or non-local (or, for non-local traffic, whether interstate or intrastate access charges apply).[86] Even Sprint Nextel agrees "that originating caller information cannot and should not always be used to determine which intercarrier compensation rate applies."[87] Likewise, AT&T is right to advise "[t]he Commission [to] reaffirm that its prior prepaid calling card orders require the payment of access charges for all interexchange calls, regardless of how they are routed through intermediate platforms."[88]

Some parties also emphasized that application of phantom traffic rules must be within the limits of technical feasibility. CTIA, for example, argued that the new rules should apply only "where transmission of the required information is feasible given the network technology deployed at the time the call is originated."[89] The proposed rules are not intended to compel originating or intermediate carriers "to deploy or replace costly

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85 *NECA, et al.* at 23.

86 Verizon at 46; CenturyLink at 23.

87 Sprint Nextel at 25.

88 AT&T at 35.

89 CTIA at 9.

equipment solely to comply with its mandate,"[90] provided this is not an excuse for a provider's continued failure to comply with industry standards for generating and transmitting appropriate call signaling information. CenturyLink respects the limits of technological feasibility, which both the Commission and the USTelecom proposals acknowledge. As the NPRM envisions, industry standards help determine such feasibility and should be relied upon to vet the ultimate technical solutions in a way that minimizes the costs to the industry.

Carriers largely agreed with CenturyLink that the Commission should ensure that the *T-Mobile Order*[91] applies to competitive LECs. It is important that, "to ensure proper billing, the Commission should make clear that ILECs may invoke the Section 252 negotiation and arbitration process with respect to wireline CLECs."[92] CTIA, however, wrongly argued that the *T-Mobile Order* should not apply to LECs, because CTIA thinks "competitive LECs and other competitors have equal bargaining power with wireless providers, and are in general regulatory parity."[93]

Failing to extend the *T-Mobile Order* to CLECs would leave much of the phantom traffic problem unaddressed and would only increase the burden on the Commission for enforcement. Many interconnection arrangements are indirect, particularly in lower density areas. CenturyLink and other carriers are continually frustrated in attempting to enforce interconnection arrangements with CLECs that do not

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[90] *Id.* Verizon (at 48) also voiced concern about "expensive systems modifications."

[91] *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, 20 FCC Rcd 4855 (2005) ("*T-Mobile* Order"). *See* US Telecom at 5-6; CenturyLink at 22, 24-25

[92] Windstream at 17.

[93] *Id.*

directly interconnect. "Expanding the *T-Mobile Order* to allow ILECs to initiate interconnection agreements with any carrier would allow them to begin the interconnection contract negotiation process, with the threat of a state arbitration proceeding if negotiations fail."[94] Indeed, the Commission should extend the *T-Mobile Order* to all negotiations between local exchange carriers, including VoIP providers and their intermediaries.[95]

C. The Commission Should Vigorously Enforce Phantom Traffic Rules.

Parties emphasized the importance of rigorous enforcement of phantom traffic rules. Virtually everyone agreed with ITTA that the Commission "should aggressively enforce the phantom traffic rules."[96] It should commit its staff to ensure "the prompt resolution of phantom traffic complaints," and it "should be proactive in initiating enforcement action against chronic violators."[97]

The Commission recognized long ago that "intercarrier compensation mechanisms present[] service providers with the opportunity and the incentive to misidentify or otherwise conceal the source of traffic to avoid or reduce payments to other service providers."[98] The Commission can now move forward to help solve this

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[94] ITTA at 22.

[95] XO Communications (at 39) contends the Commission lacks legal authority to require that competitive carriers negotiate and arbitrate with ILECs at the ILEC's request." Extending the *T-Mobile Order* to LECs is not a rewrite of Sections 251(c) and 252, but adoption of parallel procedures by Commission rule -- an act well within the agency's authority.

[96] ITTA at 21.

[97] *Id.* at 21-22.

[98] *High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, App. A, ¶ 326 (2008). *See also* National Broadband Plan at 142; NPRM at ¶ 620.

problem and end this abuse. USTelecom spoke for many parties when it said the benefits of addressing phantom traffic "need not wait for adoption and implementation of comprehensive reform of intercarrier compensation."[99] Adopting phantom traffic rules today "would provide a better baseline for transition to a new rate structure, help rationalize such transition and promote fair competition."[100]

III. THE COMMISSION SHOULD ACT PROMPTLY TO ADOPT RULES TO ELIMINATE OPPORTUNITIES TO ENGAGE IN TRAFFIC PUMPING.

A. Commenters Broadly Support Commission Rules to Curb Unlawful Traffic Pumping.

Nearly everyone commenting in this proceeding agreed that the Commission should act to stop the abuse of access stimulation. It is contrary to the public interest to tolerate LECs with high access rates artificially inflating profits by "pumping" traffic into their switches by sharing revenues with free service providers.

The magnitude of the problem is clear to everyone. The Commission projects "that the annual impact to the industry from access stimulators is significant," with "estimates [of] the total cost ... to the industry ... over $2.3 billion over the past five years."[101] Verizon has estimated the impact to be between $330 and $440 million per year.[102] Access stimulation schemes "undermine the integrity of the intercarrier

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[99] USTelecom at 4.

[100] *Id.*

[101] NPRM at ¶ 637. *See* TEOCO, *Access Stimulation Bleeds SCPs of Billions*, at 5, attached to Letter from Glenn Reynolds, USTelecom to Marlene Dortch, FCC, WC Docket No. 07-135 (filed. Oct. 18, 2011).

[102] Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, WC Docket No. 07-135 at 1 (filed Oct. 12, 2010).

compensation system," "directly harm consumers,"[103] and "impose[] undue costs on consumers, inefficiently diverting the flow of capital away from more productive uses such as broadband deployment, and harms competition."[104]

Most parties also agreed that the Commission already has a fully developed record on access stimulation issues. There is, consequently, "no reason to let this obvious and harmful arbitrage continue one day longer."[105] There is "widespread industry agreement that this problem must be addressed,"[106] "that near-term action is needed,"[107] and "that the Commission [should] act swiftly" and issue rules "quickly."[108]

The Commission's proposal received broad support. The Iowa Utilities Board described it as a "viable solution to the problem that is consistent with the Commission's benchmarking process," "consistent with precedent," and more efficient "than a process intended to determine an access rate based on a local exchange carrier's ... specific costs."[109] Even LECs and free service providers involved in past or current traffic pumping supported major aspects of the Commission's proposed reform,[110] implicitly recognizing that allowing LECs to earn grossly inflated profits from these practices is contrary to the public interest.

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[103] Windstream at 2.

[104] Time Warner Cable at 14-15, quoting NPRM at ¶ 637.

[105] USTelecom at 8.

[106] Windstream at 19.

[107] Time Warner Cable at 11.

[108] Comcast at 11; California PUC at 6-7.

[109] Iowa Utilities Board at 2.

[110] *E.g.,* Omnitel at 12; PAETEC, et al. at 22; Bluegrass Tel./Northern Valley at 14; Free Conferencing at 2.

B. The Proposed Rules Would be More Effective with Some Adjustments.

XO supported the NPRM's proposed traffic pumping rules, concluding it "is narrowly tailored to meet its goal of addressing arbitrage without burdening other carriers."[111] Comcast supports the proposed rules, but acknowledges that "other proposals" also may be effective and necessary.[112] Several parties offered adjustments to make the rules more effective in curbing the traffic stimulation problem.

CTIA supports the Commission's rules but believes it must "modify" them to be sure they can be effective.[113] It proposes an addition to the NPRM's proposed rule that would shift traffic to bill-and-keep if terminating to originating traffic exceeds a ratio of 3-to-1.

Targeting revenue sharing may be more difficult than the NPRM assumes. Time Warner Cable agreed that, "[a]s a starting point, the Commission should put an end to 'sharing' arrangements between carriers and service providers that merely serve as vehicles to inflate access revenues."[114] But it recognized that "any legal or interpretative uncertainty as to the applicability of the Commission's access-stimulation rules undoubtedly will prompt profit-seeking LECs and their partners to identify loopholes," so additional modifications are necessary to ensure all potential variations of access stimulation are covered.[115] Verizon also rightly worried that revenue sharing can

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111 XO at 41.

112 Comcast at 11.

113 CTIA at 6.

114 Time Warner Cable at 15.

115 *Id.* at 15.

sometimes be subtle and difficult to spot, such as when companies share ownership.[116] For that reason, CenturyLink had proposed the Commission adjust its rules to utilize a broad definition of "business partner."[117] The Commission's rules should be broad enough to encompass any variety of access pumping schemes.

Verizon cautioned that LECs may be able to "game their transport rate element charges by establishing artificially long transport routes only to increase these charges to other carriers." Although LECs need reasonable flexibility to route traffic, the Commission must make sure its rules do not allow LECs "to engage in transport arbitrage."[118] Access stimulation, ZipDX pointed out, is all about "'most cost routing' -- finding the path that will incur the greatest access expense, and thus maximize compensation for the collector of access charges."[119] AT&T also is concerned that the rules may not go far enough to prevent "mileage pumping" -- the abuse of centralized equal access arrangements and competitive tandem arrangements to artificially inflate the transport charges.[120] *Iowa Network Services* provided an example.[121]

CenturyLink supports a trigger approach, as the Commission suggests. That can be based on either the definition of "business partner," as Qwest had advocated, or on revenue sharing, as the NPRM proposes, or on traffic per-line, as USTelecom and other

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116 Verizon at 42.

117 CenturyLink at 35-36.

118 Verizon at 42.

119 ZipDX at 4.

120 AT&T at 30-34.

121 *See id.* at 31, citing *Iowa Network Access Div.,* 3 FCC Rcd 1468 at ¶¶ 2-4, 15 (1988).

associations have proposed.[122] Parties as varied as Level 3 and ITTA endorsed the proposed rule's requirement that, once the trigger is met, LECs adopt the nearest BOC's access rates.[123] A BOC rate is lawful and reasonable at all traffic levels. However, the Commission should ensure that a traffic pumping CLEC cannot charge for elements it does not provide, so a BOC rate may need to adjusted downward to be appropriately comparable.

C. Traffic Pumpers' Arguments Are Beside the Point.

Global Conference Partners claims that its "competitive service" is better than a "host pays all model" because it avoids "nontraditional users" to enjoy "affordable group calling."[124] But these services are not "free." Instead, they shift costs to other parties USTelecom, a fact made worse by artificially inflating those costs. If there is public benefit to granting Global Conference Partners users free services (which is frankly doubtful), then policy makers could find other ways to subsidize such a service. The Commission can be quite confident that the majority of Global Conference Partners users -- like General Electric Company, Georgia-Pacific Corporation, Harvard University, the Public Broadcasting Service, and the Department of Agriculture[125] -- are not warranting free service provided at the expense of others. It is also worth remembering that much of the nation's pumped traffic is for chat lines and audio pornography that cannot claim any public benefit.

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[122] Letter from Melissa Newman, Qwest, to Marlene Dortch, FCC, WC Docket No. 07-135 (filed Sept. 17, 2010) at 2; NPRM at ¶ 659; USTelecom at 9 n.20; NECA, et al. at 33.

[123] ITTA at 24; Level 3 at 4-5.

[124] Global Conference Partners at 5-6.

[125] *Id.* at 6.

Some traffic pumping parties criticized IXCs for allegedly engaging in "self help" when they decline to pay unlawfully assessed bills for pumped traffic.[126] They ignore that fact that these bills are unlawful, because they charge for traffic that is not covered by the traffic pumping LEC's tariffs. This issue has been fully decided in many cases -- most recently in the *All American* case at the Commission's Enforcement Bureau.[127] The bottom line is clear: the mere failure of a customer to pay an invoice is not a violation of the Communications Act. CenturyLink does not contend that a customer should not pay its legitimate bills, but the Commission is not a collection agent for any carrier.

There is one aspect of "self help" that has received little attention by those engaged in traffic pumping. That is, it is unquestionably a violation of the Act for a carrier not to enforce its tariffs. Traffic pumping LEC tariffs, like all tariffs, provide that service will be discontinued for nonpayment, and carriers are prohibited from charging other than the tariffed rate. A traffic pumping LEC is fully capable of discontinuing service to a non-paying IXC.[128] In fact, by consistently refusing to disconnect service for nonpayment, traffic pumping LECs have repeatedly failed to act in any compliance with their tariffs.

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[126] PAETEC, et al. at 16; Free Conferencing at 47; Bluegrass Tel./Northern Valley at 27.

[127] *All American Tel. Co., et al. v. AT&T Corp.*, 26 FCC Rcd 723 at ¶ 10 (2011) ("[A]lthough a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim at the Commission under section 208 (or in court under section 206) for breach of the Act itself"). *See also Qwest Communications Corp. v. Farmers & Merchants Mutual Tel. Corp.,* 22 FCC Rcd 17973 at ¶ 29 (2007) (subsequent history omitted) ("[A]ny complaint by Farmers to recovered [tariffed access] fees allegedly owed by Qwest would constitute a 'collection action,' which the Commission has repeated declined to entertain" for lack of jurisdiction.).

[128] Omnitel (at 11) contends, mistakenly, that a LEC has no ability to disconnect an IXC for non-payment under its tariff.

Some commenters argued that "revenue sharing" is a common and not unreasonable business practice. Yes, some hotels and hospitals enter into agreements with ILECs that involve commissions or sharing of revenues, without involving traffic pumping.[129] Like most other parties, however, CenturyLink has never contended that the sharing of revenues is necessarily unlawful or unreasonable. But unlike "normal" revenue sharing situations, traffic pumping relies on regulatory compulsion as an indispensible part of the business scheme. Unlike a hotel or hospital guest that is expressly guaranteed the right to bypass the business owner's default carrier, in traffic pumping the IXCs have no choice but to send traffic to the traffic pumping LECs.[130] The key to traffic pumping, in contrast, is the ability of the LEC to cite regulatory authority to compel the delivery of artificially stimulated traffic.

The cross-subsidization of a competitive service by that non-competitive service is another hallmark of traffic pumping. CenturyLink's comments outlined why these arrangements violate Section 254(k) of the Act.[131] Omnitel briefly asserted that Section 254(k) cannot apply to CLECs or to companies when they conspire together to engage in the prohibited cross subsidization.[132] The statutory provision is not somehow limited to ILECs. The Commission could largely eliminate unlawful access stimulation by expressly finding the cross-subsidization in traffic pumping violates the Section 254(k).

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[129] Omnitel at 14; PAETEC, et al. at 21; Bluegrass Tel./Northern Valley at 17; Free Conferencing at 26.

[130] *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call-Blocking by Carriers*, 22 FCC Rcd 11629 (2007).

[131] 47 U.S.C. § 254(k).

[132] Omnitel at 31.

D. The Commission Should Confirm that Artificially Pumped Traffic is Ineligible for Access Charges.

In the end, the most effective approach to traffic pumping is to confirm that artificially pumped traffic has never qualified as billable under the current access regime. CenturyLink proposed three alternatives to the Commission's proposed rule language -- any one of which would fairly and reasonably accomplish this goal. The Commission could modify its proposed rules to provide (1) that it is unlawful to apply access tariffs to artificially pumped traffic, (2) that interstate tariffs do not apply to artificially pumped traffic, or (3) that subsidizing competitive services from revenues derived from interstate switched access violates the Act.[133] At the very least, in its order the Commission should make clear that past charges for artificially inflated traffic are unlawful, because "pumped traffic is not access traffic and should not be subject to access charges."[134]

The groundwork for this approach has already been set out in the *Farmers & Merchants* case.[135] There, a rural ILEC's tariff made it clear that access traffic under that tariff was limited to traffic delivered to end users. The Commission recognized that traffic to free service providers was not covered by the applicable LEC tariff. The Commission can and should extend this same finding over all traffic delivered to a LEC's "business partner." The Commission reached a similar conclusion in its recent *YMax*

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[133] CenturyLink at 36-37.

[134] Sprint at 7.

[135] *Qwest Communications Corp. v. Farmers & Merchants Mutual Tel. Corp.* 22 FCC Rcd 17973 at ¶ 10, 14-16 (2009) (subsequent history omitted).

decision, when the Commission found the traffic pumping LEC had violated the act by billing access charges when they were not authorized by its tariff.[136]

This approach does not preclude legitimate conferencing services. In the absence of revenue sharing with a business partner, IXCs and LECs remain free to negotiate reasonable rates for access that are mutually satisfactory. This "market solution" always remains for entities seeking to provide services that otherwise would conflict with the Commission's rules.[137]

CONCLUSION

During the transition to comprehensive new rules, the Commission should take immediate steps to address arbitrage abuses and to minimize disputes that have become too common under the current intercarrier compensation system. The Commission should confirm that IP-on-the-PSTN traffic is subject to existing intercarrier compensation charges under current law. It should adopt rules to stop phantom traffic, by prohibiting mislabeling, masking, or failing to transmit identifying information. And it should adopt sensible rules to stop the unlawful conduct of traffic pumping.

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[136] *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, FCC 11-59 (rel. Apr. 8, 2011). YMax is a CLEC providing service to its affiliate, MagicJack L.P., which provides unlimited "free" calling through a widely-marketed device consumers connect to their computers. The FCC found that YMax actually provides no carrier network facilities, and none of its services qualified as "switched access service" under the tariff because the calling/calling parties who placed and received the calls at issue are not "end users."

[137] The Commission must realize that there is no such thing as a true "market rate" for services before the Commission has adopted its new rules. A few commenters claimed that negotiated settlements between traffic pumping LECs and IXC victims establish there is a "market rate" for access in these situations. Traffic pumping LECs admit that the only "market" force driving them to settle below tariff rates is the refusal of IXCs to pay their unlawfully billed charges.

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